Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
TERM 1996

Robert S. Mirin,
Petitioner, Pro Se

v.

Paul Eyerly, III, and
Press Enterprises Newspaper,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Pro Se Petitioner
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Harrisburg, PA 17111-5260

29 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the use of 28 U.S.C. §1927 to impose sanctions constituted an unwarranted judicial expansion of the statute to judicially convert it to a fee shifting statute.

II. Whether the amount of sanctions imposed upon Attorney Robert S. Mirin were lawful or reflect an abuse of discretion by the Trial Court.

PARTIES TO THE PROCEEDING

Petitioner:

Robert S. Mirin, Esquire, Pro Se

Respondents:

Press-Enterprise, Inc. and Paul Eyerly, III

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OPINION BELOW

The decision of the United States Court of Appeals for the Third Circuit concerning the Petition for Rehearing of a June 12, 1996 Memorandum and Decision to strike the imposition of sanctions as inappropriate and unsupported as set forth in Appendix A.

In so doing the United States Court of Appeals for the Third Circuit denied the Petition for Rehearing.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing was entered in the July Term, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

In addition, this Court is authorized, pursuant to 28 U.S.C. §1651(a) to issue all writs, necessary or appropriate in all of its jurisdictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

STATEMENT OF THE CASE

1. NATURE OF THE CONTROVERSY.

Michael Boykin was hired in November 1992 by Bloomsburg University. His wife Margaret Boykin had recently been hired as Director of the University Police. The Boykins are both Black. On December 21 or 22, 1992 Michael Boykin was suspended from his job pending an investigation of allegations by another University employee, Virginia McAfee, that he raped her at a December 18, 1992 Christmas party on the University grounds. On January 11, 1993, Michael Boykin was arrested by the State and charged with rape and related crimes. In the

year prior to the Boykins' arrival in Bloomsburg, there had been three rapes of Bloomsburg University students. According to the Boykins, Bloomsburg University officials, the Columbia County District Attorney, and various state police troopers caused public statements to be made defaming Michael Boykin which left the impression that he was the "serial rapist of Bloomsburg."

On October 28, 1993, following a jury trial in Columbia County Court, Michael Boykin was acquitted of the criminal charges against him.

On March 2, 1994, Michael Boykin, his wife Margaret and their son Aaron, represented by Petitioner Robert S. Mirin, Esq., filed a lawsuit in federal court alleging claims under various civil rights statutes (42 U.S.C. §§1981, 1983, 1985(3), and 1986), Title VII, the Pennsylvania Human Relations Act and state tort law against various defendants, including the University of Bloomsburg, various officials and employees of the University of Bloomsburg, state police officers, the local district attorney, and a local newspaper and its publisher. Two months later, the Boykins were compelled by motion of certain defendants, under state law, to file a virtually identical complaint in state court which was removed to federal court and consolidated with the original action.

On this appeal, Petitioner Robert S. Mirin, Pro Se, challenges the January 19, 1995 order imposing sanctions on him, as plaintiff's counsel, for bad faith, harassment and delay in filing "patently frivolous" claims in the excessive amount of $52,980.47.

2. SUMMARY OF THE FACTS.

The underlying action commenced with the filing of a Writ of Summons in the Pennsylvania Court of Common Pleas for Columbia County on

January 11, 1994. The Writ referenced Appellees "Bloomsburg University defendants," the "state police defendants," and Press Enterprise (the local newspaper) and Paul Eyerly as publisher of Press Enterprise, Inc. (the "Media Defendants") and Virginia McAfee, David Fenton, her paramour and Sallie Samsel, her sister. Initially, the Media Defendants ruled Plaintiffs to file a complaint. In response, a complaint was filed in federal court.

The Media Defendants were the only defendants who lodged a rule to file a complaint in the Common Pleas Court for Columbia County at that time. In response thereto, the complaint was filed on March 2, 1994, in the Williamsport, Pennsylvania division of the United States District Court for the Middle District of Pennsylvania pursuant to 18 U.S.C. §3231 and 28 U.S.C. §1331. The Media Defendants, alone, responded to the first complaint and filed motions under Rule 12(b)(1) and (6) seeking to dismiss the complaint. On March 2, 1994, Plaintiff's had initiated suit in the Middle District of Pennsylvania by filing a federal complaint. The Complaint alleged violations of 42 U.S.C. §§1981, 1983, 1985, and 1986, as well as violation of Title VII and a series of pendent state claims. The Media Defendants filed a 12(b)(1) and (6) motion.

On April 20, 1994, even though named in Boykin I; the remaining defendants ruled plaintiff to file the second, state court, complaint (Boykin II). Plaintiffs were thus constrained, by state procedure, to file a virtually identical state court complaint (Boykin II).

On May 17, 1994, the federal district court dismissed all claims against the Media Defendants in Boykin I(Press Enterprise and Paul Eyerly). On May 31, 1994 the Bloomsburg University Defendants petitioned for removal of

the second/state court complaint (Boykin II) to the federal district court. As noted above, the state court complaint (Boykin II) was virtually identical to the first federal complaint (Boykin I) which was filed in response to the Media Defendant's rule.

Several months after disposition of the Media Defendant's 12(b)(1) and (6) motions, subsequent sanctions hearings were scheduled and held. Sanctions in the amount of $52,980.47 were imposed on Counsel ostensibly pursuant to 28 U.S.C. §1927. Bias against Appellants and civil rights litigation in general, was demonstrated by the judge's conduct directed against Petitioner, Robert S. Mirin, reprimanding Petitioner for imaginary interruptions, and blatantly treating opposing counsel with great deference, as well as, the Judge's ruling reflecting an abuse of discretion and blatant errors of law. These erroneous rulings resulted in the draconian sanctions order. (See Appendix C)

3. PROCEEDINGS BELOW

A. Appeal to the United States Court of Appeals for the Third Circuit., Nature of Action, and Basis for Jurisdiction.

Petitioner filed a Petition for Rehearing to reconsider the June 1996 Memorandum and Decision to strike the imposition of sanctions as inappropriate and unsupported at Case No. 95-7456 in the United States Court of Appeals for the Third Circuit.

Jurisdiction was properly in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291 which confers jurisdiction over appeals on the Federal Court of Appeals from all final decisions of the District Courts residing within the circuit.

B. Relief sought

The relief requested of this Court, as well as the relief sought from the court below, is a review of the District Court's January 19, 1995 order imposing sanctions on Petitioner for bad faith, harassment and delay in filing "patently frivolous" claims. (See Appendix C)

The Petitioner sought a Petition for Review from the United States Court of Appeals for the Third Circuit of the aforementioned Order of the District Court. (See Appendix B) The Court of Appeals ordered and adjudged that the Petition for Review was denied. (See Appendix A)

Reasons for Granting the Writ

I. This Court should grant this petition for writ of certiorari and exercise its power of supervision over the United States court of appeals which has sanctioned the departure of accepted and usual course of judicial proceedings.

Sanctions under 28 U.S.C. §1927, ostensibly governing counsel's liability for excessive costs, should not be imposed against Petitioner for filing a second state court complaint (Boykin II) that was identical to a previously filed federal complaint (Boykin I). The underlying action commenced with the filing of a Writ of Summons in the Pennsylvania Court of Common Pleas for Columbia County on January 11, 1994. Initially, the Media Defendants ruled Plaintiffs to file a complaint. In response, a complaint was filed in federal court. (Boykin I)

On April 20, 1994, even though named in Boykin I; the Bloomsburg University defendants

ruled plaintiff to file the second, state court, complaint (Boykin II). Plaintiffs were thus constrained, by state procedure, to file a virtually identical state court complaint (Boykin II).

On May 17, 1994, the federal district court dismissed all claims against the Media Defendants (Press Enterprise and Paul Eyerly in Boykin I). On May 31, 1994 the Bloomsburg University Defendants petitioned for removal of the second/state court (Boykin II) complaint to the federal district court. The state court complaint was virtually identical to the first complaint (Boykin I) which was filed in response to the Media Defendant's rule.

The Court in Sendi v. NCR Comten, Inc., 624 F.Supp 1205 (E.D.Pa 1986) addressed a similar fact pattern. In Sendi, the Court ruled that although counsel's litigation tactics were not entirely unwarranted. In 1984, Sendi filed a complaint alleging that Comten's acceptance of his resignation violated the Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1 et. seq. Sendi v. NCR Comten, Inc., No. 84-2114 (E.D. Pa. filed May 2, 1984) (Sendi I). On June 10, 1985 Sendi moved for leave to amend his complaint to add counts of breach of contract. The motion was denied and summary judgment was granted for the defendant.

On October 10, 1985 Sendi filed a second lawsuit (Sendi II). Defendant moved to dismiss the Sendi II complaint, which was identical to the proposed amended complaint in Sendi I, on the ground that it is barred on res judicata. The Court in Sendi II granted defendant's motion to dismiss.

Defendant also moved for sanctions against plaintiff and his counsel pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. §1927. The Court in Sendi II stated that although the decision to file a second suit was ill-advised, the

plaintiff and his counsel did not act so unreasonably as to justify imposition of sanctions. The Court in Sendi II accepted counsel's representation that he brought Sendi II in an attempt to prevent the statute of limitations from running on plaintiff's contractual claims. The Court thereby denied defendant's request for sanctions. Sendi v. NCR Comten, Inc., 624 F.Supp 1205 (E.D.Pa 1986)

As in Sendi, petitioner in the case at bar avers that the use of the state court writ of summons procedure and the initial federal complaint involved satisfaction of the state court statute of limitations for limited components of this litigation. (i.e. the libel, slander, and invasion of privacy aspects of the conduct at issue were governed by the one year statute of limitations under Pennsylvania law. 42 Pa.C.S.A. §5523.) The balance of the claims under §§1981, 1983, 1985, and 1986 and the other state law claims have a longer two (2) year statute of limitations. See, 42 Pa.C.S.A. §5524

In the case at bar, the sanctions issue arose in the context of a pending state court Motion to Strike an improperly entered judgment/related of non pros filed by the Media Defendants based upon the fact that Boykin I was filed in federal rather than state court. The filing of Boykin II, as an identical complaint, involved counsel's concern over the possibility of waiver by implication if Press Enterprise and Eyerly was not named in the state complaint. Subsequently, given the then interlocutory disposition of the first complaint, as to Press Enterprise and publisher Paul Eyerly, there was a risk that the Court would view any deletion of Press Enterprise and the editor from the second complaint as a waiver of all claims against those defendants. Thus, if the second complaint became the operative complaint in Federal Court, a waiver argument could have resulted from

deletion of the newspaper and editor in the second/removed complaint and an arguable or potential loss of appeal right could have resulted from any deletion.

In addition, the second complaint, state court complaint (Boykin II), was filed in response to the procedural demand of the Commonwealth Defendants, who were already before the Federal Court in Boykin I. It should be noted that the complaint which involved separate federal court and state court filings were virtually identical and therefore, no additional response or extreme expense to the second complaint was required.

It is respectfully submitted that the reach of 28 U.S.C. §1927 does not extend to such state court proceedings and that the state court complaint, compelled by the Commonwealth Defendants and thereafter removed by Commonwealth Defendants to Federal Court, did not reflect willful bad faith, duplicative or any vexatious conduct on the part of Plaintiff's counsel. The supremacy clause and the scope of §1927 preclude issuance of sanctions on the basis of a compelled state court complaint. In addition, the second complaint should not have engendered any additional work for Defendants Eyerly or Press Enterprise.

A. <u>The Record Does Not Support the Imposition of Sanctions Under Any Existing Standard.</u>

This case was the first case for Petitioner Mirin under the 1993 Amendments to the Federal Rules of Civil Procedure which took effect in 1994 and the first courtroom involvement with this particular judge. The procedures at issue, in the context of the joint case management order, were being employed for the first time, pursuant to the amendments of the Federal Rules,

effective January 1, 1994.

Petitioner made a good faith effort to comply with the extensive directions reflected in the joint case management protocol, including efforts to deal with five different defense counsel spread throughout the Commonwealth of Pennsylvania, in locations ranging from Philadelphia, Pennsylvania to Altoona, Pennsylvania. The defendants and defense counsel (unsanctioned) evaded the joint case management process and submitted their own improper joint case management protocol or plan in contravention to the newly established case management procedures. Counsel made every effort to schedule the pre-conference meeting and in fact requested extensions of time in order to accomplish this meeting.

The judge demonstrated bias and arbitrary predisposition in terms of the mechanics of the hearing and by virtue of his scheduling a limitation of four (4) hours a day. This contributed to the "extended" number of days which Petitioner Mirin (based in Harrisburg, PA) and Philadelphia counsel found themselves attached in Williamsport, Pennsylvania.

The learned judge below further demonstrated bias and predisposition not only within the sanctions hearing themselves but in the handling of the underlying case, by ignoring recorded documents, failing to apply clear law of the Supreme Court, failing to recuse himself, and by failing to give any consideration or weight to the evidence and or statements of Petitioner or Plaintiff's witnesses.

Neither the facts nor the law support the imposition of sanctions in this matter and it is respectfully submitted that the decision below is defective as a matter of law and unsupported in the record and must be reversed. This use of §1927 also will chill appropriate creative advocacy in civil right's cases.

B. Courts Have Limited the Application of §1927 Which is Penal in Nature.

Courts have limited the application of §1927 which is penal in nature. The decision below improperly converted §1927 from a penal type of provision to a cost shifting statute. A summation of the controlling authority in the jurisdiction is exemplified in several Third Circuit decisions. In Jones v. Pittsburgh Nat'l. Corp., 899 F.2d 1350 (3rd Cir. 1990), the court stated that a showing of bad faith on the part of the attorney is required in order to impose §1927 sanctions. Additionally, in Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987), the court held that willful bad faith was a precondition to the imposition of attorney's fees under §1927.

There is no evidence of willful bad faith on part of Petitioner. The second complaint filed by Petitioner, discussed above, was necessary for the adequate representation of his clients, appellants--Michael Boykin, Margaret Boykin and Aaron Boykin. The preservation of certain conditions and claims of the plaintiff's cause of action that may have tolled under the appropriate statute of limitations was nothing beyond the adequate and zealous representation owed from an attorney to his/her client.

A three part analysis may be applied to issues arising under §1927. Campana v. Muir, 615 F.Supp. 871 (M.D.Pa. 1985) which involves the same trial judge. Section 1927 being penal in nature, requires, inter alia, a finding of "willful bad faith on the part of the offending attorney". In this particular case, the practice order was issued pursuant to new amendments to the Federal Rules, and involved defense attorneys scattered throughout the state. The record reflects that Plaintiff's counsel made efforts to conduct the pre-case

management conference to the extent of requesting an extension of time and was simply unable to do so.

Ostensible deficiencies within the hearing process itself were, in part, the product of the fact that this was the first occasion when counsel appeared in court under the supervision of the Honorable Malcolm Muir. Upon elucidation from the Judge, counsel after two relevant days of litigation, returned to Harrisburg from Williamsport, in each case and worked into the early morning hours in order to provide the court with items such as a reformatted listing of 95 documents on a court exhibit form and on an earlier occasion, to promptly produce further proposed findings of fact, as directed by the Court.

Substantively, the legal theory articulated under the synthesis of Judge Bork's proposed natural law jurisprudence and Employment Div. Dep't of Human Resources of Oregon, et al. v. Smith, et al., 110 S.Ct. 1595 (1990) was predicted upon a functional analysis of the framer's First Amendment issues which focused upon "seditious" libel or political speech. Such a reading would limit the scope and reach of First Amendment protections. Furthermore, the Smith-peyote case appeared to alter fifty years of First Amendment jurisprudence and integrate First Amendment privilege more fully into a general scheme of social responsibility limiting the presses' abuse of First Amendment privileges.

The referenced physical absence of newspaper articles from the complaint was explained, in the sanctions record, as involving time frames and the articles mechanical unavailability as distinguished from their existence. Ultimately, several hundred newspaper articles were produced to show the notoriety and scope of asserted libel and invasion of privacy.

The second complaint filed in state court and removed to federal court was the product of Commonwealth defendants action. It was identical to the first complaint and should not have involved any additional work, analysis or effort on the part of counsel for Press Enterprise or Paul Eyerly. They had already briefed all of the 12(b)(1) and (6)issues raised by the first complaint which, as noted, was identical to the second complaint.

The question of petitioner's motive, given the tight time sequences between the removal of the second complaint and Judge Muir's disposition of the first complaint and the removal of the second complaint, which originated in state court, also involves the related state court non-pros judgment issue. The second complaint was configured so as to avoid any argument or issue of possible waiver arising from the omission of the Press Enterprise or Eyerly from the second suit. Those factors, when coupled with Plaintiff's offer to dismiss defendant Eyerly personally and any functional analysis establishes that no additional work for Defendants should have been necessary, given the court's joinder of the two virtually identical complaints. The record as a whole, suggests that Petitioner was engaged in a vigorous effort to advance the law in view of Smith and to provide an avenue of recourse to a client that had suffered very serious injuries.

The second component of Campana's three prong test is the multiplication of proceedings. On these facts, application of §1927 raises issue under the supremacy clause to the Constitution, inasmuch as the allegedly multiplicative proceeding was lodged in state court and required, based upon the action of the Commonwealth and removed to the Federal Court by the Commonwealth defendants. Thus, it was not counsel's doing but rather a response on

counsel's part to protect the interests of the client from any possible argument of waiver that generated the second complaint.

The third analytical prong of Campana is an increased cost requirement. As to this factor, it should be noted that an examination of Boykin I and Boykin II would have led any recent law graduate to conclude that the 12(b)(1) and (6) issues were identical. Disposition of the first complaint, disposed of the second complaint. The mechanical filing of the identical complaint in state court, occasioned by the demand of the Commonwealth Defendants and necessitated by the need to protect the interest of the client from any waiver or related argument, were apparent.

Other jurisdictions have declined to apply §1927 in similar situations. In Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d. Cir. 1986), the Second Circuit held that a sanction under §1927 "must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power." Also, in Freeman v. Local Union No. 135 Chauffeurs, 746 F.2d 1316, 1322 (7th Cir. 1984), the Court refused to award monetary sanctions under §1927 because there was "no indication of subjective bad faith on the part of plaintiff's attorney." At a minimum, most cases require a showing of recklessness on the part of an attorney. The Ninth Circuit in Nanreb v. Hatch, 827 F.2d 1329 (9th Cir. 1987), required a finding that an attorney acted in bad faith or recklessly.

The use of §1927 sanctions is limited to extreme behavior by attorneys that is designed to delay proceedings. According to the federal case law dealing with §1927, in those cases where sanctions were imposed, the conduct engaged in by the attorneys was extreme. The conduct usually involved willful acts designed to delay proceeding, or to harass the opposing party, or involved the filing of unfounded

claims. Here counsel proceeded on a complex claim--promptly and in good faith. For example, counsel unsuccessfully sought only brief additional time to arrange the newly mandated joint case management conference.

In Van Berkel v. Fox Farm, 581 F.Supp. 1248 (D.Minn. 1984), the court imposed §1927 sanctions on an attorney who failed to dismiss a lawsuit after learning that it was barred by the statute of limitations. The court noted that this multiplied the proceedings "unreasonably and vexatiously." The Second Circuit in Sassower v. Field, 973 F.2d 75 (2d Cir. 1992), held that §1927 sanctions were appropriate because the pro se litigant, who was an attorney, filed recusal motions in an attempt to interfere with proceedings, made motions to reargue virtually every issue which was ruled against them, filed improper interlocutory appeals, and made personal attacks on opposing parties and counsel. The conduct in Sassower was so severe that the district court stated that the Sassower had "pursued this litigation as if it was a holy war and not a court proceeding, managed those proceedings in a fashion that vexatiously, wantonly and for oppressive reasons increased the legal fees enormously." Id., Even in the face of such outrageous behavior, the court sanctioned Sassower less than $55,000.00.

The Court of Appeals for the District of Columbia Circuit, in United States v. Levin, 964 F.2d 1214 (D.C. Cir. 1992) held that §1927 sanctions were inappropriate, and reversed the order imposing sanctions. In this case, six days before trial, the attorney realized that he had forgotten the subpoena the witnesses he intended to present. While he was in the midst of another trial, he had his investigator serve the subpoena, but learned on the eve of trial that they had in fact not been served. The attorney than met with the judge and opposing counsel and

advised them that he might still be ready. However, he was not ready and was sanctioned for this failure under §1927. On appeal, the D.C. Circuit held that this conduct, or lack thereof, while it constituted negligence, did not reach the level of bad faith, and reversed the sanctions order.

In the present case, Petitioner's actions did not involve bad faith or reckessness. There was no showing of bad faith on the part of petitioner nor showing that petitioner acted recklessly so as to multiply the proceedings. Multiplication of proceedings was the product of Commonwealth action first compelling then removing the complaint from state to federal court. All steps and procedures taken by the attorney were necessary for adequate representation of his clients. Therefore, §1927 does not apply to this case.

C. The Amount of Sanctions Imposed was Excessive and Inappropriate.

Courts have held that the financial status of the attorney must be considered when it awards monetary sanctions against the attorney under §1927. In Sassower, the court held that "when a court awards defendant's attorney's fees, it must take into account the financial circumstances..."

In the present case, not only is the imposition of sanctions in the amount of $52,980.47 inappropriate, but the amount of sanctions are excessive based upon petitioner's financial resources. Of the $52,980.47, in excess of $19,000 is alleged to be for work in response to the second complaint and in excess of $32,000 for time spent on sanctions hearings that consisted of four(4) hour litigation days. Due to the amount of sanctions imposed, petitioner was forced to file for Chapter 13

bankruptcy on May 23, 1995. The necessity for invoking bankruptcy protection evidences inability to immediately pay the sanctions imposed. The District Court's sanction order was unfairly oppressive, and excessive. Additionally, the District Court Judge approved the unreasonable and excessive hourly rate of attorney's fees imposed on petitioner. See Campana v. Muir, 615 F.Supp. 871 (M.D.Pa. 1985) which may explain the learned Judge's antipathy towards civil rights claims, and Chudasana v. Mazda Motor Corp., 4:93-CV-61-COL (M.D.Georgia, 626-95)

The evidence in the sanctions hearing disclosed that none of the Philadelphia counsel were "expert" or possessed special expertise in the sanctions area and that the use of three (3) lawyers to prepare and litigate the sanction allegations at a combined hourly rate in excess of $700.00 an hour was excessive and inappropriate; especially when experienced counsel were available in the Williamsport area for approximately $100.00 per hour.

The decision does not offer any reasonable explanation of how Movants expended in excess of $19,000.00 in billable time in connections with a response to a virtually identical second complaint--A complaint which was mandated under State law by the actions of the Commonwealth of Pennsylvania ruling that Plaintiff's file a second complaint.

D. The Record Discloses the Learned Senior Judge's Abuse of Discretion.

The decision of the lower Court does not address any of the 293 instances during the sanctions hearings when the Court systematically interrupted Petitioner and demonstrated bias and predisposition concerning the handling of Plaintiff's case. (See Appendix "D") These 293

citations to the sanctions record, taken together, reflect systematic interruption of Petitioner by the court. Since the court issued its sanctions findings without the benefit of transcript and prepared findings prior to the completion of the October week of testimony, the Senior Judge's apparent hearing and comprehension deficit are significant indicators of serious deficiencies replete in the sanction's determination and assessment.

The disposition of the Court does not address any of the 98 referenced incidents where the senior judge in question demonstrated a hearing deficit and/or comprehension deficit concerning the proceedings in the courtroom. (See Appendix D)

These citations to the record reflect the frank confusion of the learned senior judge below as to the information disseminated and events occurring in the courtroom; further supporting the inference that the judge's findings constitute an arbitrary abuse of sanctions.

The decision does not address any of the 49 cited instances where the judge demonstrated a predisposition and bias against Petitioner in the presentation of a civil rights case. (See Appendix D)

Counsel was precluded from developing a record to defend against allegations of bad faith imposed under the Court's inherent authority and jurisdiction concerning sanctions as to matters before the lower court.

The decision, without record citation or analysis was prepared, in substantial part, prior to the completion of Appellant's case, mischaracterizes counsel's testimony in the sanctions hearing, testimony which did not consume any more than a total of four hours of testimony out of the seven (7) and one half - half days, which was characterized as extending

the hearings concerning the imposition of sanctions under 28 U.S.C. §1927. The general references, passim, to the length of hearings contained no discussion or analysis of the limitations of the hearing day imposed by the sitting senior judge, the actual extent of counsel's testimony, nor the extent to which the proceedings involved with Petitioner's case or testimony. For example, there is not a single citation to the record to support the undocumented assertion that the replies of counsel (Appellant) were inappropriately evasive or inappropriately lengthy and the assertion is not supported in the decision of the Lower Court or it's conclusions which are without any citation to the record.

It was not explained, in the decision, why the described sequence of events did not provide a reasonable basis in fact and law for the defamation or privacy claims involved. Although, the Court notes, in passing, that the Plaintiffs did not even live in the area during the period of time when the so-called serial rapes were committed, the related underlying claims and legal theory were dismissed without any analysis.

The Senior Judge, at the time of the hearings, admitted that he had a hearing impairment and diabetes at the time of the proceedings. These conditions which can and do affect the ability of anyone to perceive and digest complex intellectual proceedings.

No where in the decision is there an explanation of how the Respondents initially managed to generate in excess of $19,000 in billable time in connection with a response to the virtually identical (state) second complaint. A complaint which was mandated under State law by the actions of the Commonwealth of Pennsylvania ruling Plaintiffs and requiring the second complaint.

The decision of the Court does not address comity issues in the sense that the allegedly duplicative complaint, which was compelled by State court process of a third party, and was identical to the first complaint filed an removed by a third party (the Commonwealth) to the Federal Court. See GRiD Sys. Corp v. John Fluke Mfg. Co.,, 41 F3d 1318 (9th Cir. 1994). The use of state court process as a basis for §1927 sanctions violates the principles of comity and ordered federalism. See Younger v. Harris, 401 U.S. 37 (1971).

The lower court's 23 page opinion and decision is devoid of specific record references or examples and was announced prior to the completion of the hearing process. The decision reflects a persistent pattern of clear error and abuse of discretion.

It is also significant that the Third Circuit itself is aware of recent evidence suggesting a serious problem in this area within the Circuit. Stephen P. Burbank, "Studies of Justice System Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11" (AM. JUDICATURE Soc'y 1989). While principally analyzing Rule 11, the report suggests a serious problem. The report

> "tend[s] to confirm much more frequent invocation of Rule 11 against plaintiffs that against defendants (66.7% vs. 33.3%) and more frequent imposition of sanctions on plaintiffs than defendants (15.9% vs. 9.1%). The former finding is statistically significant at a level less than 1%, but the latter is not statistically significant. When *sua sponte* impositions are included, however, the disparity becomes significant, again at a level less than 1%. As we have noted, 77.8% (21/27) of all sanctions

imposed in the survey period were imposed on plaintiffs (and/or their counsel). . . .

Id. at 65.

"[P]laintiff's (and/or their counsel) were sanctioned on motion in civil rights (including employment discrimination) cases in our survey at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases." Id. at 69. "This finding is statistically significant at a level of less than 1%." Id. at 69 n.19. "Moreover, leaving uncounselled *pro se* plaintiffs out of account, counselled civil rights plaintiffs in our sanction survey were sanctioned on motion at a rate (5/11 or 45.5%) far higher than the rate for counselled plaintiffs in non-civil rights cases (6/69 or 8.7%) -- a difference that is statistically significant at a level of less than 1%." Id. at 71.

"Sanctions seem particularly sensitive to the extent that those involved in civil rights litigation are the less fortunate among us and their champions. For this group any monetary sanctions may be regarded as punishment, and full expense-shifting may entail massive over-deterrence." Id. at 71-72 "The possibility of statutory fee-shifting in favor of defendants may diminish the *in terrorem* effect of [sanctions]. But that is not an answer to our concerns. . . . The existence of a pro-plaintiff fee-shifting status designed to ensure the availability of a pool of competent counsel is an independent reason to use [sanctions] sparingly, in order to avoid . . . conflict with Congress' policy judgments. . . ." Id. at 72. The report went on to observe that sanctions are not "intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Id. at 84.

WHEREFORE, Petitioner respectfully requests this Honorable Court to reconsider the June 12, 1996 Memorandum and Decision and strike the imposition of the excessive sanctions as inappropriate and unsupported.

Respectfully submitted,
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